SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	:	
	:	
Plaintiff,	:	**Civil Action No.: 03-4431**
	:	**Judge Boasberg**
v.	:	**Calendar 10**
	:	
CVS CORPORATION, et al.,	:	
	:	
Defendants.	:	

ORDER (1) GRANTING DEFENDANT ANCHOR PHARMACIES, INC.'S MOTION FOR SUMMARY JUDGMENT; (2) DENYING DEFENDANTS CVS CORPORATION AND MACARTHUR BOULEVARD CVS, INC.'S MOTION FOR SUMMARY JUDGMENT; (3) DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; (4) DENYING DEFENDANTS' JOINT MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF ERIC M. GAIER, PH.D.; (5) DENYING DEFENDANTS' JOINT MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF BORIS J. STEFFEN, MM, CPA; AND (6) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT FURTHER EXPERT DISCOVERY

The Court has reviewed Anchor Pharmacies, Inc.'s Motion for Summary Judgment, Plaintiff's Opposition, Anchor's Reply, CVS Corporation And Macarthur Boulevard CVS, Inc.'s Motion For Summary Judgment, Plaintiff's Opposition, Defendants' Reply, Plaintiff's Motion for Partial Summary Judgment, Defendants' Joint Opposition, Plaintiff's Reply, Defendants' Joint Motion *In Limine* to Exclude Testimony of Eric M. Gaier, Ph.D., Defendants' Joint Motion *In Limine* to Exclude Testimony of Boris J. Steffen, MM, CPA, Plaintiff's Joint Opposition, Defendants' Joint Reply, Plaintiff's Motion For Leave to Conduct Further Expert Discovery, and Defendants' Opposition.[1]

[1] The Court would be remiss if it did not point out the epidemic of footnotes in a number of these briefs, the most glaring example being the District's Opposition to CVS's Motion for Summary Judgment, which contains no fewer than 86, most of which are substantive. This only succeeds in distracting the reader and

I. Background

Plaintiff District of Columbia has brought this action against Anchor Pharmacies, Inc., CVS Corporation, and MacArthur Boulevard CVS, Inc. (the latter two are jointly referred to as "CVS") under the District of Columbia Antitrust Act. The District alleges that Defendants violated the Act by Anchor's sale of certain assets – principally, prescription files -- of one of its pharmacies to CVS. Count I of the Complaint alleges that Defendants entered into a "contract, combination, or conspiracy in restraint of trade or commerce" in violation of D.C. Code § 28-4502. Count II alleges that Defendants monopolized or attempted to monopolize the relevant market in violation of § 28-4503.

CVS and Anchor have filed separate motions seeking summary judgment. In addition, the District has moved for partial summary judgment. Defendants also have sought to exclude the testimony of two of the District's experts, Boris Steffen and Eric Gaier. Finally, the District seeks leave to take additional discovery. Each motion is considered in the lettered subheadings in Section III, *infra*.

II. Legal Standard

To prevail on a motion for summary judgment, the moving party must demonstrate, based on the pleadings, discovery, and any affidavits submitted, that there is no genuine issue as to any material fact and that it is thus entitled to judgment as a matter of law. Grant v. May Department Stores Co., 786 A.2d 580, 583 (D.C. 2001); Rule 56(c). A trial court considering a motion for summary judgment must view the pleadings, discovery materials, and affidavits in the light most favorable to the non-moving party and may grant the motion only if a reasonable jury, having drawn all

making particular arguments more difficult to follow. The Court trusts that this contagion will be brought under control in future pleadings.

reasonable inferences in favor of the non-moving party, could not find for the non-moving party based on the evidence in the record. Id. at 583 (citing Nader v. De Toledano, 408 A.2d 31, 42 (D.C. 1979)); Bailey v. District of Columbia, 668 A.2d 812, 816 (D.C. 1995).

III. Analysis

A. CVS's Motion for Summary Judgment

The District has brought this case under the District of Columbia Antitrust Act, §§ 28-4501 *et seq.*, alleging that CVS's purchase of, *inter alia*, Anchor prescription files violated §§ 28-4502 and 28-4503. These sections, which track federal antitrust statutes, forbid contracts, combinations, and conspiracies in restraint of trade or commerce, as well as monopolization or attempted monopolization of trade or commerce.

In ruling on the legal questions involved, the Court "may uses as a guide interpretations given by federal courts to comparable antitrust statutes." § 28-4515; see also Shepherd Park Citizens Ass'n v. General Cinema Beverages of Washington, D.C., Inc., 584 A.2d 20, 22-23 & n.2 (D.C. 1990) (analogizing to federal statute and approving trial court's looking to standards applied in cases arising under federal *parens patriae* statute). Neither side questions that the Court should look to federal court decisions.

As the District agrees, it has brought this case under the *parens patriae* provision of the Antitrust Act. See Opp. at 6. This statute is "patterned after the federal *parens patriae* statute." Shepherd Park, 584 A.2d at 22 n.2. If no *per se* antitrust violation exists -- an issue discussed in Section B, *infra* -- the parties appear to agree that the District must establish three elements to prevail: relevant geographic market, relevant product market, and market power. See Mot. at 4; Opp. at 13. CVS also insists that the District

must prove actual injury, a point the District strongly disputes. The Court will address each in turn.

1. *Geographic Market*

Most cogently stated, the relevant geographic market is the area "to which local consumers can practicably turn for alternatives." United States v. Marine Bancorporation, Inc., 418 U.S. 602, 619 (1974). CVS argues that the relevant market must include the pharmacies at which former Anchor and CVS consumers now fill prescriptions and that numerous other pharmacies exist within two- and three-mile radii of the CVS store. The District rejoins that two or three miles as the crow flies should not be included in the relevant market, given that prescription consumers typically look much closer to home. As a result, within the boundaries proposed by the District, see Opp. at 28, the CVS at issue is the sole provider of pharmacy products and services. CVS rejoins that this too tightly draws the market. This, the Court believes, is an issue on which a material dispute of fact exists, making it unripe for summary judgment disposition.

2. *Product Market*

Unlike the relevant geographic market, the relevant product market consists of "commodities reasonably interchangeable by consumers for the same purpose." United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956). Here, CVS focuses on the availability of internet and mail-order pharmacies as alternatives to consumers to show that the District has not established the relevant product market. Yet, its only support is a 2003 survey from the Food Marketing Institute that deals with national figures. See Mot., Exh. 6. Given that CVS's own internal analyses do not consider the impact of internet prescription sales and given that CVS has not presented undisputed

facts concerning the CVS at issue (as opposed to nationally), summary judgment on this ground would be inappropriate.

3. *Market Power*

CVS next argues that the acquisition of the Anchor prescription files has neither created nor enhanced the market power of CVS in the relevant market. This is so because, according to CVS, the District's calculations of market power are flawed, and CVS has not raised prices or excluded competitors. At bottom, CVS is arguing that the District's fears are unrealized: CVS has not acted as a monopolist since its purchase. Yet, such a view is too cabined.

As CVS itself states: "Under the Merger Guidelines, to show market power, the District must demonstrate that CVS 2204 now has 'the ability profitably to maintain prices above competitive levels for a significant period of time.'" Rep.. at 12 (quoting Merger Guidelines; emphasis added); see also Mot. at 4 (issue is "ability to profitably raise and maintain prices above competitive levels or to successfully exclude other competitors") (emphasis added). Evidence of CVS's apparent decision not to raise prices since the acquisition may well be evidence of its inability to do so, but the Court cannot find that there is no dispute of fact as to its ultimate ability to exercise market power. Given the facts articulated by the District, see Opp. at 14-26, the Court must reject CVS's position that market power cannot be shown as a matter of law.

4. *Antitrust Injury*

CVS last argues that the District must prove actual antitrust injury in a *parens patriae* case, a requirement that the District disputes. Here, CVS understandably but incorrectly argues that the District is suing under D.C. Code § 28-4507(b), which

discusses *parens patriae* authority. Instead, the District is proceeding under § 28-4508(a), which permits a "person" to bring an action for, *inter alia*, injunctive or other equitable relief. A state (or the District) may qualify as a "person" under section 16 of the Clayton Act, upon which § 28-4508 is modeled. See Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972) ("Hawaii plainly qualifies as a person under both sections of the statute, whether it sues in its proprietary capacity or as *parens patriae*.") (citation omitted).

Since the District is not seeking damages, but only injunctive and other equitable relief, it need not prove actual antitrust injury. As the Supreme Court has held, no actual injury is required in a Clayton Act § 16 suit for injunctive relief: "[W]e conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113 (1986) (emphasis added; internal quotation and citation omitted). As discussed in Section 3, *supra*, that is a question for the factfinder.

CVS's Motion is thus denied.

B. District's Motion for Summary Judgment

In seeking partial summary judgment, the District argues that the Court should not apply the rule of reason discussed in Section A, *supra*; instead, the District urges the Court to find a *per se* violation or at least to utilize a truncated rule-of-reason (or "quick look") analysis. Defendants argue that disputed facts exist that require a trial under the rule of reason.

As the District points out, *per se* illegal restraints of trade are agreements "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978). Quick-look analysis involves an intermediate level of review, more than *per se*, but less than full rule of reason. "[Q]uick-look analysis applies when the great likelihood of anticompetitive effects can easily be ascertained." Dagher v. Saudi Refining, Inc., 369 F.3d 1108, 1116 n.7 (9th Cir. 2004) (internal citation and quotation omitted).

The Court, however, believes that the District pays insufficient heed to the decisions that emphasize the limited nature of *per se* analysis. See, e.g., Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999) ("Only manifestly anticompetitive conduct, however, is appropriately designated per se illegal. The majority of allegedly anticompetitive conduct continues to be examined under the rule of reason.") (citation, internal citation, and internal quotation omitted).

According to the District, *per se* analysis is appropriate here because of the "naked restraint of trade," Mot. at 1, which is established by the closure of the Anchor store, CVS's receipt of trivial assets, and CVS's payments to Anchor that were unrelated to the assets received. Id. at 1-2. In addition, CVS's payment for non-compete agreements from Anchor reflected that the sale was clearly anticompetitive.

Defendants, however, have shown that these issues are clearly disputed and require a factual determination by a factfinder. More specifically, CVS has convincingly argued that, in the retail pharmacy business, customer lists may well exceed the value of tangible assets. Payment for such lists are not necessarily fig leaves or monopoly

premiums; instead, here this may be the most valuable asset. Similarly, in such a situation involving customer lists, covenants not to compete do not necessarily equate to a *per se* violation, particularly where the covenants are reasonable in scope, as the factfinder could find here. See Lawson Products, Inc. v. Chromate Indus. Corp., 158 F. Supp. 2d 860, 862 (N.D. Ill. 2001); cf. Deutsch v. Barsky, 795 A.2d 669, 674 (D.C. 2002) ("We have never held that a covenant not to compete that is ancillary to a valid transaction or agreement between dentists constitutes a *per se* violation of public policy.").

Finally, to the extent the District argues that a key feature of the sale was market allocation, the facts do not indisputably support such a contention. Indeed, there is no evidence that CVS and Anchor allocated some other market between themselves as part of the transaction. In other words, the District never even argues, let alone provides factual support for, the position that CVS somehow agreed not to compete in some other market dominated by Anchor in exchange for Anchor's sale of the store in the Palisades.

As the District has not shown that *per se* or quick-look analysis is appropriate here, the Court will deny its Motion and proceed to trial under the rule-of-reason analysis.

C. Anchor's Motion for Summary Judgment

Anchor has moved for summary judgment on both counts here. In its Opposition, the District concedes that Count II is unnecessary and agrees it should be dismissed. See Opp. at 2. The Motion, therefore, revolves around Count I only.

Anchor first argues that a seller of assets has no antitrust liability in this type of case. The District counters that this is not a typical merger challenge, but rather that this case involves a "market allocation agreement." Opp. at 4. The caselaw does not appear

to deal with such an agreement in actions in which damages are not sought. It is clear that in damages actions, sellers are not proper defendants. See, e.g., Gerlinger v. Amazon.Com, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004). Similarly, where the remedy of rescission is sought, the parties agree the seller is a proper defendant. See, e.g., United States v. Coca-Cola Bottling Co., 575 F.2d 222, 230 (9th Cir. 1978).

Yet, the Court need not decide whether sellers may be proper defendants in cases such as this because the District has not adduced facts to demonstrate that Anchor entered into any market allocation agreement by which it somehow gained market share elsewhere. See Section B, *supra*. To merely allege so at the summary judgment stage is insufficient. See Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.").

Neither does either of the two other "linchpin issues," see Opp. at 3, assist the District in defeating summary judgment. First, the District argues that Anchor's covenant not to compete, a part of the purchase and sale agreement, constitutes an antitrust violation. The District claims that whether the covenant was standard or anticompetitive must be for the factfinder. Id. Yet, it has not introduced evidence that the covenant was in any way improper. In the same vein, the District argues that CVS paid a monopoly premium in the sale, demonstrating that the deal was not a payment for legitimate assets. Once again, the District has not offered any evidence to rebut Anchor's testimony that the price reflected market value. Indeed, the District's own expert never even looked at

market value or the value of the non-compete covenant. See Mot., Exh. 5 (Steffen Depo) at 20, 30.

The Court thus believes that summary judgment in favor of Anchor is warranted, and it will be granted.

D. Gaier and Steffen Testimony

Defendants also move to exclude the testimony of Plaintiff's experts Eric M. Gaier and Boris J. Steffen. Our Court of Appeals has adopted the following three-part test to determine if trial courts should admit expert testimony:

> (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Dyas v. United States, 376 A.2d 827, 832 (D.C. 1977) (internal quotations and citation omitted).

There is no dispute that the testimony satisfies the first two categories, but Defendants argue that neither Steffen's nor Gaier's opinions satisfy the third prong. Defendants assert that Steffen's testimony is not relevant and that it does not meet the standard for admissibility. In particular, Defendants claim that Steffen basis his opinion on the return on invested capital ("ROIC") CVS expected to, rather than actually, realized. Yet, CVS's expectations are certainly relevant to explore their intent in consummating the transaction. Of course, CVS may rebut Steffen's testimony with

evidence of actual ROIC; this ability, however, does not make the testimony irrelevant or unfounded.

Similarly, Defendants argue that Steffen should not be able to opine on the non-competition covenants, but their arguments go more to weight than admissibility. Again, CVS is free to argue that these covenants are commonplace and unremarkable, but that does not mean the District cannot produce evidence to the contrary.

Defendants offer some of the same arguments for the exclusion of Gaier's testimony, but add others as well. Defendants contend that opinions that ignore developments in the time since the sale – that ignore reality, in their words – should not be admissible. Just like Steffen's opinions, these should not be excluded to the extent they are based on the transaction documents. A determination of the parties' intent and their plans regarding the sale, the relevant market, and market power is certainly relevant. Their impact, as the Court has mentioned, may well be diminished by facts on the ground, but this does not warrant their exclusion.

The Court, furthermore, cannot find, as Defendants claim, that some of Gaier's opinions are based solely on his experience as a consumer, nor does the Court believe other opinions on relevant market, market share, and market power should be excluded at this juncture. As Defendants correctly point out, the law does permit the Court flexibility to reconsider this during the trial: "[C]ourts conducting bench trials have substantial flexibility in admitting proffered expert testimony at the front end, and then deciding for themselves during the course of the trial whether the evidence meets the requirements of [FRE] 702." United States v. Brown, 279 F. Supp. 2d 1238, 1243 (S.D. Ala. 2003),

quoted in Rep. at 5 n.3. The Court will bear this in mind while listening to the evidence at trial.

E. Further Expert Discovery

Finally, the District seeks additional discovery related to CVS expert Barry Harris. The District seeks leave to depose CVS employee Robert Hanke, who was in charge of providing data to Harris, as well as Harris again; the District also seeks additional documentation and sanctions.

CVS responds that it has produced all documents upon which Harris relied, and the Court agrees that it has thus fulfilled its requirement. Deposing Hanke about documents he provided to Harris is not necessary. Given that Harris did amend his conclusions after the deposition, even if such amendment was favorable to the District, it is appropriate that the District be able to depose him regarding his amendments. This is particularly equitable given the second deposition of the District's expert, Gaier.

CVS has, however, acted in good faith in responding to the District's follow-up requests, thus making sanctions inappropriate here. The Court will permit a further deposition of Harris for up to 4 hours on issues contained in CVS's Second Supplemental Rule 26(b)(4) statement.

The Court, therefore, ORDERS that:

1. Anchor's Motion for Summary Judgment is GRANTED;
2. The case is DISMISSED WITH PREJUDICE as to Anchor only;
3. The District's Motion for Partial Summary Judgment is DENIED;
4. CVS's Motion for Summary Judgment is DENIED;
5. Defendants' Motion to Exclude Testimony of Gaier is DENIED;

6. Defendants' Motion to Exclude Steffen is DENIED; and

7. Plaintiff's Motion for Leave to Conduct Further Expert Discovery is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.[2]

Oct. 6, 2004
Date

James E. Boasberg
Judge

DOCKETED OCT 14 2004

MAILED OCT 14 2004

Copies mailed to:

Don Resnikoff
Asst. Attorney General
441 Fourth St., NW
Washington, DC 20001

Deana Cairo, Esquire
6225 Smith Ave.
Baltimore, MD 21209

Robert Kidwell, Esquire
701 Penn. Ave., NW
Ninth Floor
Washington, DC 20004

[2] Although the parties have filed many of their pleadings under seal, the Court does not believe that this Order discloses information that should be sealed, particularly under the stringent standards of Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988). The Order, therefore, has not been filed under seal. To the extent any party disagrees, it may file a motion showing good cause why the Order should be sealed.